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JAMES W. HOLSINGER, JR., M.D.  
SECRETARY

August 4, 2004

Nursing Facility Provider Letter # A-209

Dear Nursing Facility Provider:

The Department for Medicaid Services (DMS) has updated the nursing facility level of care (LOC) criteria. The intent of the updated criteria is to ensure that the health status of individuals is appropriately screened. The updated criteria is contained in 907 KAR 1:022E Nursing facility services and intermediate care facility for individuals with mental retardation or a developmental disability services. A copy of this regulation may be obtained at [www.chs.ky.gov/dms/regulations/default.htm](http://www.chs.ky.gov/dms/regulations/default.htm).

As you may be aware, a class action lawsuit (*Kerr v. Holsinger*) was filed by Kentucky Legal Aid Services with the Federal District Court. This lawsuit was filed on behalf of those individuals who were denied nursing facility LOC due to the April 2003 revisions in the nursing facility LOC criteria.

Because of the updated nursing facility LOC criteria, a number of individuals that were denied under the April 2003 revisions will be reconsidered for a nursing facility LOC determination. This reconsideration will be based on the existing health care information that was presented to National Health Services (NHS).

Should an individual meet the updated LOC criteria, NHS will issue a LOC confirmation notice. In the event an individual is denied nursing facility LOC, NHS will issue a denial notice. At that time, the individual may appeal the denial or reapply for Nursing Facility services.

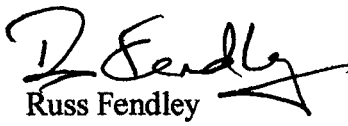
Prior to this reconsideration process, DMS reinstated services to a number of individuals. This was an attempt to restore services to individuals until their health status was considered under the updated nursing facility LOC criteria. Individuals who had their services reinstated were notified by DMS. Additionally, several recipient notifications

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regarding the reinstatement process have been mailed. For your convenience, attached are the Q & A's that will hopefully be of assistance.

Should you have questions regarding the reconsideration process contact Debbie Price with NHS at 1-800-292-2392 ext. 6464. Questions regarding recipient reinstatements, recipient notifications or the attached Q & A's should be directed to Mary Walker with the Department for Medicaid Services, Division of Long Term Care and Community Alternatives at 502-564-5560 or by email at [mary.walker@ky.gov](mailto:mary.walker@ky.gov).

Sincerely,

  
Russ Fendley  
Commissioner

RF/GO/cvc

## Questions and Answers

### 1. What is the Kerr case?

Nursing Facility Level of Care (LOC) criteria was revised April 1, 2003. The revisions resulted in denial of LOC and services for some individuals previously authorized or applying for Home and Community Based (HCB) waiver and Nursing Facility services. Since then, a lawsuit was filed in federal court in Frankfort. *Kerr v. Holsinger* Case No. 03CV68-JMHL. The plaintiffs in the case represent all people whose coverage for long-term care services was terminated after April 3, 2003. The court has ordered that coverage be fully reinstated for these individuals.

### 2. Has LOC criteria been changed?

The Department for Medicaid Services (DMS) has revised the LOC criteria based on a modified version of the regulation that was approved through the lawsuit process. National Health Services (NHS) is currently using this revised criteria. In addition, NHS will re-review all denials since April 1, 2003 using this new revised criteria.

### 3. What if an individual was denied, appealed and was denied on appeal?

Some individuals were denied on appeal and a Final Order was issued. Those individuals received a letter informing them that their services (and in some cases, their Medicaid eligibility) had been reinstated. A copy of the individual's letter was sent to their provider. Per Home and Community Based Waiver Provider Letter # A-206 dated 5-20-04, providers were instructed to resume providing services to the individual or to assist the individual in locating another provider. If you have any questions regarding the services the individual was previously receiving, contact NHS.

### 4. What if an individual filed an appeal but they haven't had a hearing yet?

Some individuals filed for appeal and their appeal was pending. No Final Order was issued to these individuals and they were to continue to receive services until the appeal was heard. These appeals have now been dismissed. Letters were sent to individuals with pending appeals informing them that their appeal has been dismissed and they will continue to receive services pending re-review by National Health Services (NHS) under the revised LOC criteria. A copy of this letter was not sent to the provider. Providers should continue providing services to these individuals pending re-review by National Health Services.

- What if these individuals are not currently receiving waiver services?

DMS has verified that waiver segments for these individuals are open. If the individual is not currently receiving services, the provider should begin providing the same services that were in place at the time of denial. If you have any questions regarding the services the individual was previously receiving, contact NHS.

- What if they are not eligible for Medicaid?

DMS has reinstated eligibility for these individuals. Continued coverage will be subject to financial eligibility requirements. They will receive a letter from the local DCBS office requesting income and resource information. This information will be used to decide if they will continue to be financially eligible for Medicaid.

### 5. What about those who did not file an appeal?

Those who did not file an appeal will not have services reinstated. NHS will re-review their eligibility for Nursing Facility LOC under the newly revised criteria.

6. What about those who were denied on an initial LOC review?

NHS will re-review their eligibility for Nursing Facility LOC under the newly revised criteria. Once Nursing Facility LOC is determined, the individual will need to apply for Medicaid eligibility.

7. What are the timeframes for the re-reviews?

NHS is currently re-reviewing LOC for those individuals who had a pending appeal. All re-reviews related to the Kerr Case should be completed within 90 days.

8. What criteria is NHS using to review? What do I need to do?

Re-reviews will be done based on existing information. NHS will contact providers to request additional information prior to issuance of a denial. Additionally, providers will be notified after the review has been completed of the determination.

9. What if an individual got a letter and doesn't want Waiver or Nursing facility services?

Whether or not to get services is entirely up to the recipient. They should be informed that they do not have to receive services if they don't want them.